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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. MARK ANTHONY RODRIGUEZ, Defendant and Appellant.	B212969 (Los Angeles County Super. Ct. No. BA337492)

APPEAL from a judgment of the Superior Court of Los Angeles County, Charles F. Palmer, Judge. Affirmed.

Feria & Corona and Jennifer L. Peabody, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Stephanie A. Miyoshi and David A. Wildman, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant Mark Anthony Rodriguez on one count each of assault with intent to commit rape, oral copulation or digital penetration (Pen. Code, § 220, subd. (a)),[1] second degree burglary (§ 459), and false imprisonment by violence (§ 236).[2] On appeal, defendant contends the evidence is insufficient he had the specific intent to commit rape, oral copulation or digital penetration during the assault. We affirm.

FACTS

On the afternoon of March 8, 2008, Kim E., a real estate agent, was placing signs in the area featuring a vacant house she was selling. Defendant approached Kim E., introduced himself as "Rudy Herrera," and claimed to be working for a title company. Kim E. refused defendant's offer of a ride back to the house, saying she would meet him there. At the house, defendant walked through the rooms, and Kim E. stayed in the kitchen. She felt apprehensive about being alone with defendant.

At some point, defendant called out that he had a question and asked Kim E. to come to one of the bedrooms. She went to the bedroom, but stopped in the hallway just outside the open bedroom door. Defendant questioned Kim E. about the bedroom closet doors while walking towards her. He grabbed her elbows and began pulling her into the bedroom. Kim E. pulled away from him and screamed for help. Defendant kept saying that he wanted to see her "pussy." As Kim E. struggled, defendant "pulled her top" and "lifted" her dress. He "was putting his hands in that part, trying to feel, trying to violate

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[1] Statutory references are to the Penal Code.

[2] In a bifurcated proceeding, defendant admitted he was subject to sentencing under the "Three Strikes" law for two prior serious or violent felony convictions (robbery and attempted robbery) (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)) and under section 667, subdivision (a)(1), and had served three separate prison terms for felonies within the meaning of section 667.5, subdivision (b). After dismissing one prior strike conviction in furtherance of justice, the trial court sentenced defendant to an aggregate state prison term of 25 years: 12 years or double the upper six-year term on count 1, plus 10 years for the two five-year prior serious felony enhancements, plus three years for the three one-year prior prison term enhancements.

[her] in the best way he could."[3] Defendant pulled down Kim E.'s underpants, stopped her from pulling them back up, and then pulled them off of her. Kim E.'s shoes came off in the hallway, during the assault.

Defendant forced Kim E. into the bedroom, closed the door and threw her on the floor so that her back was against the door. Kim E. fought back and screamed for help. Defendant put his mouth on her lips and chest, and he pushed her down, while tugging on his shirt. He pulled down her dress, but then "backed off" when Kim E. punched his face. He ignored her punches, however, in repeated attempts to put his head under her dress.

Kim E. sought to escape by telling defendant she needed to leave to get a condom. Defendant told Kim E. that he did not want to have sex with her, "I just want to see your pussy." At some point, defendant glanced towards the bedroom window and suddenly said that he had to go. Before leaving, he put his lips on Kim E.'s mouth for a long time, cutting her lip.

Thanyarat Plaengprawat came to view the house, saw Kim E.'s shoes in the hallway, and heard her yelling "stop" and crying for help. Plaengprawat telephoned her boyfriend, Lance Alexander Paige-Roca to join her. He looked through the windows of the house and saw defendant with Kim E. in the bedroom. Defendant had his hands on Kim E.'s shoulders and was trying to pull up her dress while she was struggling to get away. Paige-Roca knocked on the bedroom window. Defendant looked up and then fled from the house. Paige-Roca tackled him outside. Police arrived and took defendant into custody.

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[3] Without defense objection, during direct examination the prosecutor summarized Kim E.'s testimony that she "already told us that [defendant] pulled on your top, that he pulled your panties down, and he put his hand in your private area." In any event, it was reasonable for the jury to infer that Kim E. was referring to her genital area when she testified defendant "put his hand in that part, trying to feel, trying to violate [her] in the best way he could."

DISCUSSION

1. *Applicable Legal Principles*

To assess a claim of insufficient evidence in a criminal case, "we review the whole record to determine whether any rational trier of fact could have found the essential elements of the crime or special circumstances beyond a reasonable doubt. [Citation.] The record must disclose substantial evidence to support the verdict—i.e., evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. [Citation.] 'Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]' [Citation.] A reversal for insufficient evidence 'is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support"' the jury's verdict." (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.)

"'"The essential element of [assault with intent to commit rape] is the intent to commit the act against the will of the complainant. The offense is complete if at any moment during the assault the accused intends to use whatever force may be required.'" [Citation.]" The same is true, we believe, of assault with intent to commit oral copulation or digital penetration. "'"[I]f there is evidence of the former intent and acts attendant to the execution of that intent, the abandonment of that intent before consummation of the act will not erase the felonious nature of the assault."' [Citation.]" (*People v. Maury* (2003) 30 Cal.4th 342, 399-400.) "'"To support a conviction for . . . [assault with intent to commit rape], the prosecution must prove the assault and an intent on the part of the defendant to use whatever force is required to complete the sexual act against the will of the victim. [Citations.] It is the state of mind of the defendant . . . which is in issue."

[Citations.]'" (*People v. Greene* (1973) 34 Cal.App.3d 622, 648 (*Greene*), see also *People v. Bradley* (1993) 15 Cal.App.4th 1144, 1146, disapproved on another ground in *People v. Rayford* (1994) 9 Cal.4th 1, 21.) Inferences from conduct and the surrounding circumstances may be considered by a jury in making this determination. (*Bradley, supra,* 15 Cal.App.4th at p. 1154.)

2. *Defendant's Contentions*

Defendant does not dispute that he used force to overcome Kim E.'s will during the assault. Instead, defendant maintains the evidence establishes that he lacked the specific intent to complete a sexual act against Kim E., other than to see her genitals and to kiss her on the chest and mouth. In support of this claim, defendant points to his assurances to Kim E., ("I don't want to have sex with you," and "I just want to see your pussy,") and his corresponding conduct at the time (his actions did not involve removing his pants, exposing himself or manipulating his penis, or placing his hands on her mouth or genitals). Defendant argues that after isolating and overpowering Kim E., had he wanted to do more than look at her genitals, he easily could have.

Defendant relies in part on *Greene, supra,* 34 Cal.App.3d 622, in challenging the sufficiency of the evidence as to his specific intent. In *Greene,* the Court of Appeal modified the defendant's conviction of assault with intent to commit rape to simple assault. (*Id.* at pp. 627, 654.) According to the evidence in that case, the defendant approached the victim, put his arm around her waist, and turned her around. The defendant told the victim not to be afraid, he had a gun, and not to move. (*Greene, supra,* 34 Cal.App.3d at p. 650.) The victim felt something hard against her right side but did not look to see if it were a gun. At the defendant's request, the victim put her arm around his waist and the two began walking. The victim asked the defendant what he wanted. He replied, "'I just want to play with you.'" (*Ibid.*) As they walked, the defendant moved his hand up and down the victim's waistline. After a few minutes, the victim broke from the defendant's embrace without a struggle and ran to a friend's home. (*Ibid.*) A jury found the defendant guilty of assault with intent to commit rape. (*Id.* at p. 627.)

The *Greene* court concluded there was insufficient evidence to support the jury's finding of assault with intent to commit rape, noting the defendant did not attempt to disarrange the victim's clothing, nor did he expose himself to her. (*Greene, supra,* 34 Cal.App.3d at p. 650.) Although the victim feared the defendant intended to rape her, the victim's "unexpressed subjective evaluation of the situation cannot make an assault with intent to commit rape out of a simple touching which objectively can only be attributed to attempted seduction, or an attempt to secure the satisfaction of some unnatural or abnormal sexual interest, short of actual sexual intercourse." (*Id.* at p. 651.)

3. *There Was Sufficient Evidence of Defendant's Specific Intent*

We conclude there is sufficient evidence in this case for the jury to determine defendant assaulted Kim E. with the specific intent to rape, to orally copulate or to digitally penetrate her. The record shows, at various times during the assault, defendant pinned Kim E. to the floor, pulled up her dress, removed her underpants, placed his hand in her crotch area, and repeatedly tried to put his head under her dress, all of which support a reasonable inference defendant intended to engage in one or more of the alleged sexual acts. Certainly his conduct fails to suggest defendant desired only to look at her genitals. As for his repeated assurances at the time to that effect, the jury was not obligated to believe them. Indeed, because defendant gave a false name to Kim E., lied about his reasons for touring the house, and lured Kim E. to the bedroom on a pretense, it was reasonable for the jury to view these assurances as yet another ruse, employed this time to dissuade Kim E. from resisting.

Finally, the record shows Kim E. became apprehensive of defendant early on, and when he grabbed her she fought back. Although Kim E. was clearly overpowered by defendant, she kept punching him, at one point causing him to forego further attempts to pull down her dress. In spite of Kim E.'s vigorous resistance, defendant continued his assault, stopping only upon realizing he was being watched. Defendant's persistence in these circumstances underscored the seriousness and fixity of his purpose to do more than just look at her genitals. That defendant's assault of Kim E. was interrupted before he was able to commit his intended rape, oral copulation or digital penetration does not

sufficiently change the state of the evidence to render the inference drawn by the jury unsupported.

Defendant's reliance on *Greene* is unavailing because that case is factually distinguishable. *Greene* did not involve an incident of aggressive sexual touching indicative of an intent to commit rape, oral copulation or digital penetration by means of continuing physical force sufficient to overcome the victim's resistance. Furthermore, unlike this case, the defendant in *Greene* did not struggle with the victim when she pulled away. Instead the defendant's conduct in *Greene* was consistent with his professed goal of merely "to play" with the victim.[4]

By contrast, in *People v. Craig* (1994) 25 Cal.App.4th 1593, 1604 (*Craig*), the Court of Appeal found sufficient evidence of intent to commit rape in a case with facts even less compelling than those presented here. In *Craig*, the defendant followed the victim as she drove home. After pulling into the victim's driveway behind her, the defendant said he had mistaken her for someone else. (*Id.* at p. 1595.) The defendant appeared to leave, and the victim turned back to the car to tend to her young son. The defendant then confronted the victim, pushing her onto the driver's seat. The defendant placed his hand under the victim's sweater, "touching both of her breasts outside her bra." (*Id.* at pp. 1595-1596.) Fortunately, the victim's boyfriend interrupted the attack, by pulling the defendant off of the victim. (*Ibid.*)

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[4] Significantly, the court in *Greene* contrasted the facts before it with those of cases in which the defendant was found to have committed an assault with intent to commit rape. In the cited cases, the defendants engaged in behaviors such as fondling the victim's private parts, entering a woman's bedroom and covering her mouth without any attempt to take property, and knocking the victim down and repeatedly pulling up her dress. (*Greene, supra,* 34 Cal.App.3d at p. 652, fn. 8, citing *People v. Bard* (1968) 70 Cal.2d 3; *People v. Elder* (1969) 274 Cal.App.2d 381; *People v. Nye* (1951) 38 Cal.2d 34; *People v. Clifton* (1967) 248 Cal.App.2d 126; *People v. Peckham* (1965) 232 Cal.App.2d 163; and *People v. Woods* (1946) 75 Cal.App.2d 246.)

In distinguishing *Greene,* the *Craig* Court concluded the present scenario presented stronger evidence of physical acts leading to intercourse. (*Craig, supra*, at p. 1600.) Additionally, the court concluded that although the defendant in *Craig* "was interrupted by some intervening force," under the circumstances, a reasonable inference "can be drawn that [the defendant] would have continued to pursue a sexual end if [the boyfriend] had not physically pulled [the defendant] off [the victim] and struck him." (*Ibid.)*

We derive a similar conclusion in the present case. The evidence is sufficient to support defendant's convictions on counts 1 and 2.

DISPOSITION

The judgment is affirmed.

WOODS, J.

We concur:

PERLUSS, P. J.

ZELON, J.